Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1158

JOSEPH RICCO

Defendant-Appellant

vs.

STATE OF OHIO

Plaintiff-Appellee

ON APPEAL FROM
THE COURT OF APPEALS FOR
THE EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY, OHIO AND FROM
THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

JOSEPH RICCO

Defendant-Appellant

-vs-

STATE OF OHIO

Plaintiff-Appellee

JURISDICTIONAL STATEMENT

Defendant-appellant (hereinafter sometimes called "defendant" or "appellant") appeals from the judgment of the Court of Appeals of Cuyahoga County, Eighth Appellate District, State of Ohio, entered February 18, 1979, reversing the judgment of the Municipal Court of the City of Cleveland, State of Ohio, which had ordered the dismissal of the prosecution which is the subject of this appeal. On September 7, 1979, the Supreme Court of Ohio overruled appellant's motion for an order directing the Court of Appeals to certify its record. At the same time, the Supreme Court of Ohio also entered an order dismissing appellant's appeal of the order of the Court of Appeals described above, for lack of a substantial constitutional question. The latter order is a decision on the merits which is

appealable to this Court, Tumey v. Ohio, 273 U.S. 510, 515 (1927), and is also appealed herein by the appellant. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The orders and opinions below are not reported. They are set out in the appendix, infra, pages 1a-8a.

JURISDICTION

This appeal arises from a prosecution of the appellant in the Cleveland Municipal Court for pandering obscenity in violation of Ohio Revised Code Section 2907.32(A)(4). On March 21, 1977, the trial court granted appellant's motion to dismiss the prosecution on the ground that Ohio Revised Code Section 2907.35(C), which exempts motion picture projectionists from prosecution under the Ohio obscenity statutes, violates the equal protection clause of the Fourteenth Amendment of the United States Constitution as to bookstore clerks and cashiers, including this appellant. On February 8, 1979, the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio, reversed the decision of the trial court and remanded the case for further proceedings. On September 7, 1979, the Supreme Court of Ohio declined plenary review of this case, simultaneously overruling appellant's motion to certify the record and dismissing appellant's appeal for lack of a substantial constitutional question.

This being a final judgment of the highest court of Ohio in which a decision could be had in a case where is drawn in question the validity of a statute of the State of Ohio on the ground of its being repugnant to the Constitution of the United States and the decision being in favor of its validity, jurisdiction of this appeal is conferred by 28 U.S.C. §1257(2).

Notice of Appeal was filed in the Supreme Court of Ohio on December 4, 1979 (App. pp. 9a-10a), and in the Court of Appeals and in the Cleveland Municipal Court on December 5, 1979 (App. 11a-12a). By order issued by Justice Stewart on November 29, 1979, the time for docketing this appeal was extended to February 4, 1980.

STATUTES INVOLVED

Section 2907.32 of the Ohio Revised Code (pandering obscenity offense) and Section 2907.35(C) (projectionist immunity) are set forth in the appendix at pages 13a-16a, infra.

QUESTION PRESENTED

Do the Ohio statutes which grant an examption from prosecution under the obscenity laws for motion picture projectionists who have neither a financial stake in their place of employment nor any managerial responsibility for its operation, but which permit such prosecution of bookstore clerks and cashiers who have neither a financial stake in their place of employment nor any managerial responsibility, violate the right of such bookstore clerks and cashiers to equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

On December 6, 1976, appellant was arrested and charged in the Cleveland Municipal Court with pandering obscenity in violation of Ohio Revised Code §2907.32(A)(4).

On December 28, 1976, defendant filed a motion to dismiss the complaint, urging inter alia, that his prosecution under the obscenity statutes denied him equal protection of the law, in contravention of the Fourteenth Amendment of the United States Constitution. On March 21, 1977, the motion to dismiss was granted on this ground. The prosecution moved for leave to appeal to the Court of Appeals for the Eighth Appellate District (Cuyahoga County). That motion was granted, and on February 8, 1979, the Court of Appeals announced its decision reversing the decision of the trial court and remanding the case for further proceedings. On September 7, 1979, the Supreme Court of Ohio upheld the decision of the Court of Appeals by entering the orders described above, denying appellant's motion to certify the record and dismissing his appeal.

The equal protection argument asserted by the defendant and accepted by the trial court was that as a clerk or cashier in the bookstore where he was arrested, the defendant was similarly situated to projectionists who are exempted from prosecution by Revised Code Section 2907.35(C); and that, therefore, the obscenity offense established in Section 2907.32 of the Revised Code arbitrarily discriminates against bookstore clerks and cashiers.

THE QUESTIONS ARE SUBSTANTIAL

The Ohio statutory scheme permits prosecution of nonmanagerial employees of bookstores under the obscenity laws, while immunizing similar employees of motion picture theaters who happen to be projectionists. The Court of Appeals of Cuyahoga County, Ohio, has already recognized that this classification bears no rational relation to the furtherance of a legitimate state interest and therefore violates the equal protection clause of the Fourteenth Amendment. State v. Burgun, 49 Ohio App. 2d 112, 124-126 (1976). The reasoning of the Court of Appeals is contained in the following paragraph:

> "R.C. 2907.35(C) in effect creates a special defense for non-managerial employees who happen to be projectionists. All other non-managerial employees may not use this defense. The only real difference between the two classes of employees is that one class is composed of projectionists and the other class is composed of non-projectionists. Such a distinction will not support R.C. 2907.35(C) in the face of an equal protection challenge. The legitimate state interest that is furthered by the prohibition on pandering obscenity is the curtailment of the trafficking in obscene materials for commercial gain. That goal could not possibly be furthered by protecting projectionists from prosecution while leaving all other employees

liable to prosecution. If the legislature wished to exempt from the scope of R.C. 2907.32 all those who were not profiting from the sale of obscene materials other than by earning wages, then it should have exempted all non-managerial employees who do not have a financial interest in the business. In light of the statutory scheme employed to prevent the pandering of obscenity there is no rational basis which would justify the legislature in protecting projectionists from criminal prosecutions for pandering obscenity while leaving exposed to prosecution all other similarly situated employees. R.C. 2907.35(C) creates a classification which bears no rational relation to the furtherance of a legitimate state interest; therefore, it violates the Equal Protection Clause." 49 Ohio App. 2d at 124-26, 359 N.E.2d at 1026-27.

This reasoning of the Court of Appeals echoes a similar conclusion of Maryland's highest court in Wheeler v. State, 281 Md. 593, 380 A.2d 1052 (1977), which struck down Maryland's comparable exemption for motion picture theater employees. The Court of Appeals of Maryland considered a variety of factual arguments presented by the government in furtherance of the validity of the classification. It rejected the notion that the degree to which the obscene matter is handled by the employees differs significantly as between bookstores and theaters. 380 A.2d at 1059. It

rejected the difference in the distribution pattern of films and books as a justification for the classification. Id. It concluded that, while there is a distinction between obscene motion pictures and other obscene matter, this Court has permitted a greater degree of regulation of films than of books. Id. at 1060, citing Miller v. California, 413 U.S. 15, 26, n. 8 (1973).

> "[A] classification based upon control of obscene films and pictures more lenient than those imposed on other obscene matter certainly could not serve as a rational basis for that classification in light of the governmental objective." Id.

The Supreme Court of Ohio has not decided the issue of the equal protection validity of the projectionist immunity statute, Ohio Revised Code Section 2907.35(C). In State v. Burgun, 56 Ohio St. 354 (1978), the Supreme Court considered and reviewed four obscenity convictions in which the equal protection argument at issue here was raised. However, the Court declined to reach the merits of the equal protection issue because it concluded that the convictions were not erroneous in view of the fact that the defendants had not established their status as non-managerial clerks or cashiers.

In the case at bar, the trial court was satisfied the defendant had brought himself within the classification effected by the exemption of the projectionists. Moreover, the defendant's claim to the status was uncontroverted. To require the

defendant to go further and offer testimony as to his status as a non-managerial clerk or cashier would be to force him to abandon his constitutional privilege against self-incrimination in order to assert his equal protection rights. The exercise of the privilege against self-incrimination cannot be penalized in this manner. Cf. Marchetti v. United States, 390 U.S. 39 (1968); and Leary v. United States, 395 U.S. 6 (1969).

The Court of Appeals of Cuyahoga County, while determining that the projectionist exemption violated equal protection precepts, declined to strike down Section 2907.32 as applied to bookstores and cashiers. Instead, it purported to strike down the projectionist immunity contained in Section 2907.35(C), itself. State v. Burgun, 49 Ohio App. 2d 112 (Cuyahoga 1976). The Supreme Court of Ohio has not so ruled, and under Ohio law the decision of the Court of Appeals on this point is plainly erroneous inasmuch as the Ohio Supreme Court has held that a statute cannot be declared partially invalid when the result would be to extend its operation beyond that which the legislature contemplated. See Board of Health v. Greenville, 86 Ohio St. 1, 36 (1912); State ex rel. English v. Industrial Commission of Ohio, 160 Ohio St. 215 (1953) (separate opinion of Taft, J.).1/ The net effect of striking down

1/ In Wheeler v. State, 281 Md. 593, 380 A. 2d 1052 (1977), applying reasoning similar to that set forth above, the Maryland court of appeals refused to strike down the Maryland motion picture theater employees exception and instead ruled that the underlying obscenity statute violates equal protection rights.

the statutory exemption for motion picture projectionists would be to create judicially the crime of operating a motion picture projector in the exhibition of an obscene film. This result would violate the prohibition of the creation of common law crimes as set forth in Ohio Revised Code Section 2901.03.

The fact remains that when the appellant in the case at bar was arrested while performing his duties as a bookstore clerk in the state of Ohio, a motion picture projectionist similarly engaged in the dissemination of obscene material could not have been prosecuted.

Even under the "relatively relaxed" rational basis standard, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976), this Court has required some "acceptable rationale" or "reasonable basis" for a legislative classification. See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 491 (1972). And where a classification has impinged on important personal interests which have not been recognized as fundamental rights calling for technically strict scrutiny, it has been suggested that this Court will nevertheless closely examine the relationship between the classification and the legislative purpose. See Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. (1972); Nowak, Rotunda and Young, Constitutional Law 526 (1978); see Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319-20 (1976) (Marshall, J. dissenting); Foley v. Connelie, 435 U.S. 291 (1978) ("close" but not

"strict" scrutiny of alien age classifications). Arguably, strick scrutiny should apply to this case because whether or not obscenity is protected speech, the prosecution of bookstore clerks and cashiers who have no control over the merchandise stocked in their places of employment has an obvious chilling effect upon First Amendment values. Legislative classifications which implicate First Amendment rights are among those which give rise to a requirement of strict scrutiny. See Williams v. Rhodes, 393 U.S. 23, 30 (1968).

Irrespective of whether the scrutiny applied to the legislative classification involved in this case is "strict," "close," or merely "relaxed," the projectionist exemption renders Ohio's obscenity statutes invidiously discriminatory. Wheeler v. State, 281 Md. 593, 380 A.2d 1052 (1977), found the comparable Maryland statute invalid under the rational basis test. No legislative purpose (other than, perhaps, the intent to favor a particular special interest group) is discernible here.

The discriminatory Ohio scheme of prosecuting the lowest echelon employees of bookstores while exempting motion picture projectionists who are in all significant respects similarly situated is wholly arbitrary, fundamentally unfair, and can only be remedied by invalidation of the prohibition against pandering obscenity contained in Ohio Revised Code Section 2907.32. This flagrant violation of the equal protection clause of the Fourteenth Amendment requires plenary review by this Court.

CONCLUSION

For the foregoing reasons, appellant respectfully urges the Court to note jurisdiction and grant plenary review of this appeal.

Respectfully submitted,

BERNARD A. BERKMAN
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and PALDA

Attorney for Defendant-Appellant

APPENDIX

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO) 1979 Term
City of Columbus) To wit: September 7, 1979

State of Ohio,	)	No. 79-512
	)	
Appellee,	)	MOTION FOR AN ORDER
	)	DIRECTING THE
vs.	)	COURT OF APPEALS
	)	
Joseph Ricco,	)	For Cuyahoga County
	)	
Appellant.	)	TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Berkman, Gordon, Kancelbaum, Levy and Murray.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____, 19__.

_____ Clerk

_____ Deputy

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 37824

STATE OF OHIO,	)	APPEAL FROM
CITY OF CLEVELAND	)	CLEVELAND
	)	MUNICIPAL COURT
APPELLANT	)	
	)	No. 76 CRB 30342
-vs-	)	
	)	JOURNAL ENTRY
JOSEPH RICCO	)	AND OPINION
	)	
APPELLEE	)	

DATE Feb. 8, 1979

KRENZLER, J.:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

On December 6, 1976, Joseph Ricco, the defendant-appellee, hereinafter referred to as the appellee, was arrested and charged with violation of R.C. 2907.32(A)(4), the statute governing pandering of obscenity. On December 28, 1976, the appellee, stating that he was a

cashier, filed a pre-trial motion to dismiss the complaint in the Cleveland Municipal Court. The motion was based on four grounds: 1) that the complaint failed to allege all the material elements of the offense charged; 2) that the statute upon which the charges were based was unconstitutionally overbroad; 3) that the statute was unconstitutionally vague; and 4) that the appellee was denied equal protection of the laws.

On March 21, 1977, the trial court granted the appellee's motion to dismiss. The following entry was placed on the docket:

> "Motion to dismiss granted. Defendant denied equal protection of the laws."

The thrust of the appellee's argument on the equal protection ground in his motion to dismiss was that the entire statute governing the pandering of obscenity, R.C. 2907.32, was rendered invalid when this court declared a related section, R.C. 2907.35(C), to be an unconstitutional violation of equal protection. See State v. Dalene Burgun, (1976), 49 Ohio App. 2d 112 (Burgun I).1/

Section 2907.35(C) of the Revised Code provides:

> (C) Sections 2907.31 and 2907.32 of the Revised Code do not apply

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1/ Our decision in this case was not appealed to the Ohio Supreme Court.

> to a motion picture operator or projectionist acting within the scope of his employment as an employee of the owner or manager of a theatre or other place for the showing of motion pictures to the general public, and having no managerial responsibility or financial interest in his place of employment, other than wages.

In Burgun (I), supra, we ruled that although the qualified exemption for projectionists contained in R.C. 2907.35(C) was invalid, the basic provisions governing the pandering of obscenity in R.C. 2907.32 were "still valid and of full force and effect." 49 Ohio App. 2d at 127. The effect of our decision in Burgun (I) then was to strike out an exception to the pandering statute, but to leave the statute itself unimpaired.

On May 9, 1977, we granted leave to the appellant, the State of Ohio, to appeal the judgment of the court below granting the appellee's motion to dismiss.

It is clear that the trial court's dismissal of this case was directly contrary to our ruling in Burgun (I), that R.C. 2907.32 is still valid and of full force and effect, despite our invalidation of the projectionist exception contained in R.C. 2907.35(C). We have previously held that the prosecution of a cashier under R.C. 2907.32 was not in violation of the equal protection clause. State v. Dalene Burgun, supra (Burgun I); State v. Ronald Burgun (Cuy. Cty., Aug. 18, 1977), No. 36078 (Burgun II); State v. Bayless (Cuy. Cty., July 21, 1977), No. 36264; State v. Krute (Cuy. Cty., Aug. 4, 1977),

No. 36092; State v. Turoso (Cuy. Cty., July 14, 1977), No. 36368.

In State v. Burgun (1978), 56 Ohio St. 2d 354 (Burgun II), the Ohio Supreme Court reviewed our decision in Burgun (II), State v. Bayless, supra; State v. Turoso, supra; and State v. Krute, supra, and upheld the constitutionality of the pandering obscenity statute, R.C. 2907.32, "when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15."2/ In its Burgun (II) decision, the Supreme Court did not reach the question of whether the qualified projectionist exemption contained in R.C. 2907.35(C) violates the equal protection clause of the Fourteenth Amendment. Nor did the court address the question of whether invalidation of the qualified exemption would render the basic obscenity pandering statute invalid. The court held that "a person who is seeking to raise the issue of the validity of a discriminatory enactment has no standing for that purpose unless he belongs to a class which is prejudiced by the statute. Witham v. South Side Bldg. & L. Assoc. (1938), 133 Ohio St. 560; Anderson v. Brown (1968), 13 Ohio St.

2/ The Supreme Court reversed our decision in State v. Ronald Burgun, supra, (Burgun II), on the ground that the trial court had failed to instruct the jury on the definition of obscenity established in Miller v. California, supra. State v. Ronald Burgun (1978), 56 Ohio St. 2d 354 (Burgun II). The court affirmed our decisions in State v. Bayless, supra; State v. Krute, supra; and State v. Turoso, supra.

53." Id. at 365. The court noted that "none of the appellants offered proof at the trial court level to show that they were in a position similar to that of the projectionists." Thus there was "insufficient probative evidence in the record to establish that a proper person has brought himself within the class of persons standing in the same position as the statutorily exempted projectionists." Id. Accordingly, the Supreme Court rejected the appellants' equal protection argument.

In Burgun (II), supra, the appellants were all cashiers and clerks in a position similar to the appellee in the case at bar. In the case at bar, as in Burgun (II), no evidence has been presented to demonstrate that the appellee is within the class prejudiced by the statute.

In the absence of a contrary ruling by the Ohio Supreme Court, we reaffirm our decision in Burgun (I), supra, that our invalidation of the qualified projectionist exemption contained in R.C. 2907.35(C) on equal protection grounds does not invalidate the basic obscenity pandering statute, R.C. 2907.32. We also note that the appellee in the instant case has not presented evidence which would place him within a class prejudiced by the statute. See State v. Ronald Burgun, (1978), 56 Ohio St. 2d 354. Accordingly, the court below was in error in discharging the appellee based on his equal protection argument, and the appellant's assignment of error is well taken.

The decision of the court below is reversed and the case remanded for further proceedings consistent with this opinion.

This cause is remanded to the Cleveland Municipal Court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PARRINO, P.J.,
PRYATEL, J., CONCUR

/s/ Alvin I. Krenzler
Judge
ALVIN I. KRENZLER

Appearances:

For Plaintiff-Appellant: Almeta Johnson

For Defendant-Appellee: Bernard Berkman

(Filed December 4, 1979)

IN THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO	)	
	)	
Plaintiff-Appellee	)	CASE NO. 79-512
	)	
-vs-	)	
	)	
JOSEPH RICCO	)	NOTICE OF APPEAL
	)	
Defendant-Appellant	)	

Defendant-appellant Joseph Ricco hereby gives notice of his appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Ohio entered on September 7, 1979, dismissing defendant-appellant's appeal herein for lack of a substantial constitutional question, and overruling defendant-appellant's motion for an order directing the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio, to certify its record herein.

This defendant-appellant further gives notice of his appeal to the Supreme Court of the United States from the judgment of the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio, entered February 18, 1979, reversing the judgment of the Municipal Court of the City of Cleveland, State of Ohio, in favor of the defendant-appellant Joseph Ricco.

This appeal is taken under 28 U.S.C. Section 1257(2).

/s/ Bernard A. Berkman
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(Filed December 5, 1979, in the Court of Appeals and in Cleveland Municipal Court)

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	
	)	
Plaintiff-Appellee	)	CASE NO. 37824
	)	
-vs-	)	
	)	
JOSEPH RICCO	)	NOTICE OF APPEAL
	)	
Defendant-Appellant	)	

Defendant-appellant Joseph Ricco hereby gives notice of his appeal to the Supreme Court of the United States from the judgment of the Court of Appeals of Cuyahoga County, Eighth Appellate District, State of Ohio, entered February 18, 1979, reversing the judgment of the Municipal Court of the City of Cleveland, State of Ohio, in favor of the defendant-appellant Joseph Ricco.

On September 7, 1979, the Supreme Court of the State of Ohio, in case No. 79-512, dismissed defendant-appellant Joseph Ricco's timely-filed appeal herein for lack of a substantial constitutional question and on the same day overruled defendant-appellant Joseph Ricco's timely-filed motion for an order directing this Court to certify its record herein. Notice is hereby given that defendant-appellant Joseph Ricco also appeals the aforesaid judgments of the Supreme Court of Ohio.

This appeal is taken under 28 U.S.C. Section 1257(2).

/s/ Bernard A. Berkman
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OHIO REVISED CODE §2907.32

Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, sicentific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

OHIO REVISED CODE §2907.35

Presumptions; notice.

(A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling materials or exhibiting performances, who, in the course of business:

(1) Possesses five or more identical or substantially similar obscene articles, having knowledge of their character, is presumed to possess them in violation of division (A)(5) of section 2907.32 of the Revised Code;

(2) Does any of the acts prohibited by section 2907.31 or 2907.32 of the Revised Code, is presumed to have knowledge of the character of the material or performance involved, if he has actual notice of the nature of such material or performance, whether or not he has precise knowledge of its contents.

(B) Without limitation on the manner in which such notice may be given, actual notice of the character of material or a performance may be given in writing by the chief legal officer of the jurisdiction in which the person to whom the notice is directed does business. Such notice, regardless of the manner in which it is given, shall identify the sender, identify the material or performance involved, state whether it is obscene or harmful to juveniles, and bear the date of such notice.

(C) Sections 2907.31 and 2907.32 of the Revised Code do not apply to a motion picture operator or projectionist acting within the scope of his employment as an employee of the owner or manager of a

theater or other place for the showing of motion pictures to the general public, and having no managerial responsibility or financial interest in his place of employment, other than wages.

Supreme Court, U. S.
FILED
FEB 25 1980
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. 79-1158

JOSEPH RICCO

Defendant-Appellant

vs.

STATE OF OHIO

Plaintiff-Appellee

ON APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, IN AND FOR THE COUNTY OF CUYAHOGA, AND FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS
OF APPELLEE, STATE OF OHIO

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1158

JOSEPH RICCO,

Defendant-Appellant

vs.

STATE OF OHIO

Plaintiff-Appellee

ON APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, IN AND FOR THE COUNTY OF CUYAHOGA, AND FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OF APPELLEE, STATE OF OHIO

The State of Ohio, Plaintiff-Appellee herein, respectfully moves this Honorable Supreme Court of the United States for an order dismissing this appeal, pursuant to Rule 16(1)(a), (b), and (d). The grounds for this Motion to

Dismiss are that the appeal is not within the jurisdiction of this Court; that the federal question sought to be presented by Defendant-Appellant was not properly raised; that the State courts' judgments rest on adequate non-federal grounds; that the appeal does not present a substantial federal question; and further, the Court should not set the case for argument because the controversy involving the issue raised below is still in a state of conflict and thus not ripe for adjudication and would interfere with the orderly consideration of the question by the Ohio courts.

Further, if this appeal is dismissed as improvidently taken or for want of jurisdiction, and the papers treated as if a petition for a writ of certiorari, then the writ of certiorari should be denied for the reasons set forth above.

OPINIONS BELOW

The orders and opinions entered in the instant case below are unreported and set out in the Appendix to the Jurisdictional Statement filed by Defendant-Appellant. However, consideration of this appeal necessarily involves other Ohio decisions bearing directly on this issue which are the reported cases of: State of Ohio v. Dalene Burgun, 49 Ohio App.2d 112, 359 N.E.2d 1018 (Cuyahoga County, 1976), and State of Ohio v. Ronald Burgun, et al., 56 Ohio St.2d 354, 384 N.E.2d 255 (Ohio Sup. Ct. 1978), rehearing denied on January 17, 1979, no appeal taken to United states Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

1. Whether the decision of an intermediate state appellate court in ruling that an exemption statute is invalid, while leaving the general prohibition statute valid and unaffected by the severance of the exemption, creates an "appeal" as an affirmance of a statute or merely presents a question for review by writ of certiorari.

2. Whether the holding of a state supreme court that a challenge to a general prohibition statute, by unsupported allegations concerning the effect of an exemption to that statute, was not properly presented and would not be considered because the defendant thereby lacked standing prevents review by this Court under 28 U.S.C. §1257 and Rule 16(1)(b) and presents a procedural state rule which is supported by a legitimate state interest and rests on adequate non-federal grounds.

3. Whether the decision of an intermediate state appellate court that it would not strike down a general prohibition statute because of its belief in the invalidity of an exemption to that statute, where it would sever only the exemption and leave the general statute in full force and effect, is an adequate non-federal ground for the remand to the state trial court for further proceedings and trial.

STATEMENT OF THE CASE

Defendant-Appellant was arrested and charged, on December 6, 1976, with Pandering Obscenity under Ohio Revised Code Section 2907.32. On March 21, 1977, the Cleveland Municipal Court dismissed the case on the ground that Defendant was being denied the equal protection of the laws. On February 8, 1979, the Cuyahoga County Court of Appeals ruled that Defendant's case be remanded for further proceedings and trial, finding no denial of equal protection under that appeals Court's prior opinion that the qualified exemption for motion picture projectionists (O.R.C. 2907.35(C)) was invalid and to be severed from the general prohibition statute (O.R.C. 2907.32). (These statutes are set out in the Appendix to the Defendant-Appellant's Jurisdictional Statement.) The Supreme Court of Ohio, on September 7, 1979, denied Defendant's motion to certify the record and dimissed his appeal, a decision which if allowed to stand will result in this case returning to the Municipal Court for further pre-trial and trial proceedings.

The history of the treatment by Ohio

Courts of the qualified exemption and limited immunity for projectionists, as it affects the general prohibition against the pandering of obscenity, is somewhat complex but necessarily concerned with the consideration of this appeal.

Defendant-Appellant, Joseph Ricco, was arrested in 1973 for violation of Ohio's "variable obscenity" statute regarding the dissemination of "harmful materials" to juveniles (O.R.C. 2907.31). It was established at trial, in which Defendant testified, that he was the owner of the bookstore on East 185th Street in Cleveland. This fact was pointed out by the Cuyahoga County Court of Appeals, per Judge Krenzler who also authored the opinion in the instant case, as evidenced by the first page of the Court's 1974 opinion (Set out in the Appendix hereto) where that court states:

> The facts are that the defendant owns a book store in the City of Cleveland.

In 1975, an employee of Defendant's store, Dalene Burgun, was arrested for Pandering Obscenity under O.R.C. 2907.32. On August 12, 1976, the Court of Appeals announced its reversal of her conviction on grounds of defective pleadings and jury instructions. In the course of this opinion, State of Ohio v. Dalene Burgun, 49 Ohio App.2d 112, at 124-27, 359 N.E.2d 1018, at 1026-27 (Cuyahoga County, 1976) (Copies of these pages of the opinion are set out in the Appendix hereto), the court discussed the contention that O.R.C. 2907.35(C), which grants a qualified exemption to certain non-managerial and non-owner projectionists, violates

the Equal Protection Clause of the Fourteenth Amendment. The court found that it did and stated that:

> Accordingly, we hold that R.C. 2907.35(C) is invalid and must fall, but R.C. 2907.32 is still valid and of full force and effect.

At no time during pre-trial motion proceedings, nor at trial, did Dalene Burgun offer or solicit any evidence that she had no managerial responsibility or financial interest other than wages in the store. In fact, the proof showed that she exercised managerial authority over the store. This is significant because the only projectionists who are entitled to the affirmative defense of O.R.C. 2907.35(C) are those, in the words of the statute, "having no managerial responsibility or financial interest in his place of employment, other than wages". The bookstore in which Dalene Burgun was working, and in which Joseph Ricco was charged in this appeal, is not a theater and, although it contains "peep show" booths for the viewing of pornographic movies by vending machine operation, there is no projectionist working at the store.

The absence of evidence by a defendant concerning lack of managerial responsibility and financial interest became the crucial fact in the decision of the Ohio Supreme Court on this issue. In State of Ohio v. Ronald Burgun, et al., 56 Ohio St.2d 354, at 365, 384 N.E.2d 255, at 263 (1978) (Set out in full in the Appendix hereto), the Supreme Court of Ohio refused to review the convictions involved in

this appeal because none of the defenddants involved had ever "offered proof at the trial court level to show that they were in a position similar to that of the projectionists".

Defendant-Appellant, Joseph Ricco, has likewise offered no evidence that he is non-managerial and has no finanical interest in the bookstore. It is expected that this would be impossbile in light of his ownership and obvious managerial functions. There have, therefore, been no cases presented to any Ohio court in which the person claiming denial of equal protection, and seeking the invalidation of the entire statutory obscenity provisions on this collateral ground, has standing and a position similar to those certain projectionists qualified to request the limited immunity offered by the exemption.

BRIEF IN SUPPORT OF MOTION TO DISMISS

I. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT

This appeal is allegedly based upon 28 U.S.C. Section 1257(2). However, the action of the Ohio appeals court has been to strike down a statute (O.R.C. 2907.35 (C)). The Ohio Supreme Court refused to review such issue for standing reasons. In the case of State of Ohio v. Ronald Burgun, et al., supra, the Supreme Court of Ohio authoritatively construed the Pandering Obscenity statute to incorporate the guidelines for defining obscenity announced in Miller v. California, 413

U.S. 15, at 24-25, 37 L.Ed.2d 419, 430-31, 93 S.Ct. 2607 (1973). No appeal as of right was taken to this Court under Section 1257(2), even though the attorneys in that Ohio Supreme Court case are the same attorneys involved in this appeal (and handled nearly all of the several hundred obscenity prosecutions in Cleveland over the past several years) and were well aware of the opportunity to do so. This collateral attack on Ohio's statutes is as yet undecided since neither the Ohio Supreme Court nor the Court of Appeals upheld the Pandering statute on this ground. The Court of Appeals has only struck down the projectionist statute. It is clear that the Ohio Supreme Court upheld the Pandering statute on First Amendment grounds by construing the "Miller Test" into the statute and did not review the projectionist issue. The Court of Appeals, likewise upheld the Pandering statute on the same First Amendment grounds (See Dalene Burgun, supra) but in this appeal by Joseph Ricco merely repeated its opinion that the projectionist exemption statute is invalid. The Court of Appeals opinion (at page 7a of the Appendix to the Jurisdictional Statement) refers to the ruling by the Ohio Supreme Court (Ronald Burgun, supra, refered to as "Burgun (II)") and noted that Joseph Ricco had also failed to establish a proper record for challenging this projectionist exemption statute:

> In the absence of a contrary ruling by the Ohio Supreme Court, we reaffirm our decision in Burgun (I), supra, that our invalidation of the qualified projectionist exemption contained in

> R.C. 2907.35(C) on equal protection grounds does not invalidate the basic obscenity pandering statute, R.C. 2907.32. We also note that the appellee in the instant case has not presented evidence which would place him within a class prejudiced by the statute. See State v. Ronald Burgun, (1978), 56 Ohio St. 2d 354. Accordingly, the court below was in error in discharging the appellee based on his equal protection argument, and the appellant's assignment of error is well taken.

The action of the Ohio Supreme Court in denying Joseph Ricco's appeal in this case, set out in its Judgment Entries of September 7, 1979 (included at pages 1a and 2a of the Jurisdictional Statement), did not affirm the opinion of the Court of Appeals on the issue of whether the exemption denies equal protection or whether it can be severed if it does, as pointed out by the Court of Appeals (See page 6a of Appendix to Jurisdictional Statement), but merely stands for the position that no proper constitutional claim has been presented. Therefore, the only question before this Court is an improperly presented and unsupported allegation of denial of equal protection, which is in the nature of Defendant-Appellant's complaint that the Court of Appeals has improperly struck down O.R.C. 2907.35(C) and refused to hear his claim concerning the denial of an asserted federal right. These are questions for a writ of certiorari and not properly presented as an appeal under Section 1257(2). It is requested, therefore,

that this Court dismiss this appeal as improvidently taken, rather than for want of a substantial federal question.

II. THE FEDERAL QUESTION WAS NOT PROPERLY RAISED.

At no time has Defendant-Appellant offered evidence that he is in a class of persons who are prejudiced by the limited exemption for projectionists under Ohio law. In fact, no person has yet offered such evidence and the proof at obscenity trials is that the cashiers and clerks who have been convicted in Cleveland have been shown to exercise managerial authority over the operation of the store. The arrested persons, while performing the function of "clerks", have been the only persons working the stores at the time of the offense, have had apparent and exercised authority over who may enter and view materials and films, and have generally shown authority above and beyond that which a projectionist could have if the projectionist were to be eligible for the statutory exemption.

It has long been established that this Court has no jurisdiction to review state court actions where the federal question was not properly raised, and was for that reason not decided, in the courts below. Cardinale v. Louisiana, 394 U.S. 437, 438-39, 22 L.Ed.2d 398, 400-01, 89 S.Ct. 1116 (1969). As stated in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 49 S.Ct. 61 (1928), this Court will require that "the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time". (Emphasis added)

In order to prevent state courts from evading federal review, this Court in Henry v. Mississippi, 379 U.S. 443, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965), required that the "State's insistence on compliance with its procedural rule serves a legitimate state interest". The Supreme Court of Ohio, in the Ronald Burgun case, supra, has made it clear that before the projectionist statute be challenged that the challenger show he or she is prejudiced by it. This is a rule of procedure having the state interest of judicial economy and preservation of the requirement of a "case or controversy". Such a standing requirement insures that only aggrieved parties can seek invalidation of long standing state statutes.

This Court's requirements in following state procedures in raising a federal question by a prescribed method would be useless if not otherwise. See: In re Lamkin, 355 U.S. 59 (1957); Ferguson v. Georgia, 365 U.S. 570 (1961); Stern and Gressman, Supreme Court Practice, Section 3.27, pages 214-20 (5th Ed. 1978). Since the Supreme Court of Ohio had denied Joseph Ricco's appeal, it must be examined what effect that refusal has on the issues raised. In light of its Ronald Burgun opinion, supra, it is clearly not an approval of the decision of the Court of Appeals, at least not on the basis of the appeal Court's reliance on its earlier Dalene Burgun case supra. The Supreme Court was denying review for lack of standing, as such was pointed out by the Court of Appeals. Since "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless

the aggrieved party in this Court can affirmatively show the contrary". Street v. New York, 394 U.S. 576, 582 (1969); Fuller v. Oregon, 417 U.S. 40, 50n.11 (1974); Supreme Court Practice, supra at 214. The mere statement by the Ohio Supreme Court's standard judgment entry form that Joseph Ricco's appeal was dismissed "for the reason that no substantial constitutional question exists" does not mean the issue was considered or even foreclosed if properly presented by Joseph Ricco on remand to the trial court. See: Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-34 (1913); Supreme Court Practice, supra at 220.

The requirement of a defendant placing himself in a position showing a denial of equal protection before a challenge can be made has been historically consistent both in civil and criminal law. Rosenthal v. New York, 226 U.S. 260, 271 (1912); Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576 (1915). As summarized in Arkadelphia Co. v. St. Louis Ry. Co., 249 U.S. 134, at 149 (1919):

> It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature.

Due to the failure of Defendant-Appellant to properly raise the asserted deprivation of federal rights, at least until this stage of the case, this appeal should be dismissed, pursuant to Rule 16 (1)(b), and the case remanded to the trial court.

III. THE OPINION OF THE STATE COURTS REST UPON ADEQUATE NON-FEDERAL GROUNDS.

The Supreme Court of Ohio has denied review of this issue upon standing and inadequate record presentation grounds. The Court of Appeals, although ruling in this case upon standing grounds as well, has reasserted its 1976 opinion that it would strike down only the projectionist statute and leave all persons subject to prosecution.

The remedy for what the Court of Appeals perceives as a possible denial of equal protection is to sever the offending exemption. (See State v. Dalene Burgun, supra.) This remedy, even if it were the sole ground for remanding Joseph Ricco to the trial court, is an adequate non-constitutional ground for dealing with Joseph Ricco's claim. Defendant-Appellant asserts that striking the exemption, rather than the entire obscenity code of Ohio, discriminates against him, even though he does not show that he is one of the "lowest echelon employees" (See Jurisdicational Statement at 10). Mr. Ricco also asserts that severance is not permitted under Ohio law, and is not an adequate remedy (See Jurisdictional Statement at 8). Defendant-Appellant's argument in this regard is at odds with that of the Court of Appeals opinion in Dalene Burgun, supra, and was unpersuasive to the Supreme Court of Ohio in Ronald Burgun, supra. Furthermore, Defendant-Appellant's position is not supported by decisions of this Court and of the Ohio Supreme Court that limited statutes may be severed from general statutes. See: Davis v. Wallace, 257 U.S. 478, 484 (1922);

Truax v. Corrigan, 257 U.S. 312, 341-42 (1921); State ex rel. v. Buckley, 60 Ohio St. 273, 296-97 (1899); Emmons v. Keller, 21 Ohio St.2d 48 (1970)(Syllabus Three). See also: State v. Luck, 353 So.2d 225 (Louisiana Sup. Ct. 1977).

If a state court finds a denial of equal protection by the operation of an exemption statute, and severs and invalidates only that section, then the federal right sought to be asserted by Joseph Ricco is cured, since no one else enjoys a more favorable position. Further, since the remedy of severance is a matter of state court construction of state statutes, then the claim that the entire code should fall is not a federal question any longer but a question resting on state grounds. Therefore, the appeal should be dismissed on this basis.

IV. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The question of whether all state obscenity statutes are invalid if there exists a qualified immunity for non-managerial projectionists is not of such constitutional magnitude to warrant plenary review. Considering all the effort that has been expended to arrive at a definition of obscenity following Miller v. California, supra, it would be disruptive if a new and improperly presented collateral attack is heard. This disruption would even effect California, which was the basis for the Miller case itself, since that state is among twenty states that exempt certain projectionists. (See list of such states in Appendix hereto.) In states where the projection-

ist exemption has been fully considered, the statute has been upheld as not denying equal protection and as a legitimate legislative decision with a rational basis. See: Gould v. People ex rel. Busch, 56 Cal. App.3d 909, 128 Cal. Rptr. 743, 749 (1976); State v. J-R Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049, 1061-62 (1973); People v. Victoria, 409 N.Y.S.2d 937 (Cr. Ct. N.Y.C., Queens County, 1978).

Because all films are presumptively protected by the First Amendment until proven obscene, then those who own or are involved in the business of disseminating obscenity should suffer the consequences of their voluntary actions. This includes clerks and cashiers who have scienter of the materials but continue to aid the business of dealing in hard-core pornography. Projectionists, in most instances, are members of a union which dictates where they work and governs the conditions and loyalties of their employment. This is not so for other owners and employees of the "adult" bookstores and theaters. Further, the Codified Ordinances of the City of Cleveland, Section 693.07, requires that all (carbon-arc) motion picture machines be operated by licensed projectionists.

> Section 693.07 Licensed Operators Required
>
> Only licensed picture machine operators shall be employed or permitted to operate any picture machine, unless exhibited by or incidental to the purposes of any charitable, religious, benevolent or public and private educational facilities.

(Ord. N. 191-70. Effective June 4, 1970)

(This is a basis for protection against fire and safety hazzard which insures proper training which licensed and union projectionists provide.) There exist legitimate reasons to treat projectionists differently than those who pick the films to be shown. Someone must independently protect safety and fire considerations, and only those projectionists who have no managerial responsibility or ownership are protected.

State statutes are presumed valid until clearly and properly shown to conflict with the Constitution, and should be construed to cure any conflict if possible. State of Ohio v. Court of Common Pleas of Cuyahoga County, 9 Ohio St.2d 159, 224 N.E.2d 906 (1967); Ohio Public Interest Action Group, Inc. v. Public Utilities Commission, 43 Ohio St.2d 175, 331 N.E.2d 730 (1975); Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 39 (1955). See also: McGowan v. Maryland, 366 U.S. 420, 425 (1961); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

Until clearly proven otherwise, this exemption should be considered valid and not creating a denial of equal protection. The Defendant should prepare a record when challenging a statute not only of his status but of the effect of the statutes and lack of rational basis for the difference in treatment. Until this has been accomplished, and the record in this case is inadequate for these purposes, the statute should be presumed in law and fact to be valid and presenting no substantional federal question.

CONCLUSION

The law in Ohio is in a state of uncertainty and flux on this issue. If this conflict of opinion and status between the Ohio Supreme Court and the Cuyahoga County Court of Appeals were presented to a federal district court, it would be proper for abstention to lie under Railroad Commission v. Pullman, 312 U.S. 496 (1941); and Moore v. Simms, ___ U.S. ___, 60 L.Ed.2d 994 (1979). This Court should similarly abstain from interfering with the orderly presentation and resolution of this isse in Ohio. All that is needed for the Ohio Supreme Court to take the case is for a proper defendant to place himself in the same stead as the exempted projectionists and, therefore, create proper standing. The Court of Appeals opinion would thereby receive review and narrow the issues for this federal Court to consider. This is not such a case.

It is requested, therefor, that this appeal be dismissed for want of juridiction or because not properly presented or resting on adequate state grounds. In the alternative, it is requested that the case be dismissed for want of a substantial federal question.

The alternative dismissal for want of a substantial federal question is not as desirable would in effect affirm the unreviewed Court of Appeals opinion and preclude proper review by the Ohio Supreme Court, but is within the power of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 22nd day of February, 1980, three copies of the Motion to Dismiss of Appellee, State of Ohio were mailed to Bernard A. Berkman, Esq., Gordon, Levy, Murry and Palda, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113.

BRUCE A. TAYLOR
Counsel for Appellee

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 32905

State of Ohio, City of Cleveland

APPELLEE

-vs-

Joseph Ricco

APPELLANT

APPEAL FROM

CLEVELAND MUNICIPAL COURT

No. 223,536

JOURNAL ENTRY

DATE JUL 1 1 1974

This cause came on to be heard upon the pleadings and the _____ transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Defendant was charged by affidavit with knowingly selling material to a minor, Robert Sanders, which is obscene and harmful in violation of R. C. 2903.14.

Defendant was tried before a jury in the Municipal Court of Cleveland and was found guilty of knowingly selling material harmful to minors. The charge of selling obscene material to minors was dropped.

The facts are that the defendant owns a book store in the City of Cleveland. It has two sections: one for adults, and one for the general public.

THE STATE OF OHIO, APPELLEE, *v.* BURGUN, APPELLANT.

[Cite as State v. Burgun (1976), 49 Ohio App. 2d 112.]

Criminal procedure—Crim. R. 3—Material elements of crime must be stated in complaint—Criminal law—Pandering obscenity—R. C. 2907.01(F) constitutional—R. C. 2907.35(C) unconstitutional.

1. The formal criminal charge whether by an indictment, an information, or a complaint under Criminal Rule 3, must contain the constituent elements of a criminal offense. While all the specific facts relied upon to sustain the charge need not be recited, the material elements of the crime must be stated.
2. The numerical designation of the applicable criminal statute in a complaint does not cure the defect in failing to charge on all the essential elements of the crime.
3. The language of R. C. 2907.01(F), being more precise in defining what constitutes obscenity than the former section R. C. 2905.34, is constitutionally sound and complies with the *Miller* test. (*Miller* v. *California* (1973), 413 U. S. 15; *State, ex rel. Sensenbrenner,* v. *Book Store* (1973), 35 Ohio St. 2d 220; and, *Hollington* v. *Ricco* (1973), 40 Ohio App. 2d 57, followed.)
4. In the light of the statutory purpose to prevent pandering of obscenity, no rational basis exists to justify the protection of projectionists from criminal prosecutions and leaving exposed to prosecution all other similarly situated employees. Since the amendment to the original statute contained in R. C. 2907.35(C) fails to afford equal protection to all employees working solely for wages, it is unconstitutional.
Where an amendatory exception is declared unconstitutional the original statute stands wholly unaffected by such ruling.

(No 34968—Decided August 12, 1976.)

APPEAL: Court of Appeals for Cuyahoga County.

by the trial judge to comport with the standards laid down in *Miller* v. *California, supra,* and the appellant was not prejudiced.

Prior to the revision of the Criminal Code in 1974, Ohio's definition of obscenity was found at R. C. 2905.34. R. C. 2905.34 was similar to Ohio's present definition of obscenity with the exception that the present definition is more precise in defining what constitutes obscenity. In construing R. C. 2905.34 the Ohio Supreme Court held that the statute was constitutionally sound and that it complied with *Miller* v. *California* (1973), 413 U. S. 15. *State, ex rel. Sensenbrenner,* v. *Book Store* (1973), 35 Ohio St. 2d 220; see also *Hollington* v. *Ricco* (1973), 40 Ohio App. 2d 57. These cases support the conclusion that R. C. 2907.01(F) which is more precise and definite than R. C. 2905.34 is likewise not overboard or vague.

Appellant's fifth assignment of error is overruled.

Appellant's sixth assignment of error is that R. C. 2907.35(C) which exempts a projectionist from prosecutions for pandering obscenity denies the appellant equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. R. C. 2907.32 makes the pandering of obscene materials a criminal offense. R. C. 2907.35(C) provides, however, that "a motion picture operator or projectionist acting within the scope of his employment as an employee of the owner or manager of a theater or other place for the showing of motion pictures to the general public, and having no managerial responsibility or financial interest in his place of employment, other than wages" is not subject to prosecutions for pandering obscenity. The appellant contends that the legislature in carving out a special defense for projectionists who work in establishments that show obscene films and not providing the same defense for other similarly situated employees of those establishments violated the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment does not forbid all statutory classifications but only those that do not further an appropriate governmental

interest. *San Antonio School District* v. *Rodriguez* (1973), 411 U. S. 1; *Police Department of the City of Chicago* v. *Mosley* (1972), 408 U. S. 92. The traditional test under the Equal Protection Clause is whether the classification bears a rational relationship to some legitimate state purpose. If the classification bears a rational relationship to a legitimate state purpose, it is valid. If, on the other hand, classification has no rational basis it violates the Equal Protection Clause and is invalid.

R. C. 2907.35(C) provides that "a motion picture operator or projectionist acting within the scope of his employment as an employee of the owner or manager of a theater or other place for the showing of motion pictures to the general public, and having no managerial responsibility or financial interest in his place of employment, other than wages" is not subject to prosecution under R. C. 2907.32. The appellant contends that there is no rational basis or distinguishing between a motion picture projectionist who has no managerial responsibility or financial interest other than wages in the establishment which employs him and which shows obscene pictures and a sales clerk or other employee who similarly has no managerial or financial interest in the business which employs him. We agree. R. C. 2907.35(C) in effect creates a special defense for non-managerial employees who happen to be projectionists. All other non-managerial employees may not use this defense. The only real difference between the two classes of employees is that one class is composed of projectionists and the other class is composed of non-projectionists. Such a distinction will not support R. C. 2907.35 (C) in the face of an equal protection challenge. The legitimate state interest that is furthered by the prohibition on pandering obscenity is the curtailment of the trafficking in obscene materials for commercial gain. That goal could not possibly be furthered by protecting projectionists from prosecution while leaving all other employees liable to prosecution. If the legislature wished to exempt from the scope of R. C. 2907.32 all those who were not profiting from the sale of obscene materials other than by earning

wages, then it should have exempted *all* non-managerial employees who do not have a financial interest in the business. In light of the statutory scheme employed to prevent the pandering of obscenity there is no rational basis which would justify the legislature in protecting projectionists from criminal prosecutions for pandering obscenity while leaving exposed to prosecution all other similarly situated employees. R. C. 2907.35(C) creates a classification which bears no rational relation to the furtherance of a legitimate state interest; therefore, it violates the Equal Protection Clause.

When a court determines that a statutory defense to a criminal prohibition violates the Equal Protection Clause, it has two alternative remedies it may grant. It may strike down both the defense and the criminal prohibition on the theory that striking down the defense provision alone would extend the operation of the criminal statute beyond the scope of the legislative intent, or it may strike down the defense alone if that would not defeat the legislative intent. When the criminal prohibition and the defense are enacted at the same time, it is generally held that the legislature did not intend the criminal statute to operate without the defense, and if the defense is invalid both the defense and the substantive provision will be struck. If, however, the defense was enacted as an amendment to an already existing criminal statute, the court can conclude that the invalid amendment does not affect the prior valid criminal statute and strike down only the defense. In *Davis* v. *Wallace* (1922), 257 U. S. 478, the United States Supreme Court struck down a tax statute that contained an invalid exception. In invalidating the statute the court explained the reasons for the two different approaches:

"Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the state; and no other authority is competent to

give them a larger application. Had they been enacted without the excepting provision, and had it been embodied in a subsequent amendatory act, a different situation would be presented,—one in which that provision would have no bearing on the meaning or scope of the others,—because an existing statute cannot be recalled or restricted by any thing short of a constitutional enactment. This was recognized in *Truax* v. *Corrigan* (December 19, 1921, 257 U. S. 312, ante, 254, —— A. L. R. ——, 42 Supp. Ct. Rep. 124), where when an amendatory exception proved unconstitutional, we held that the original statute stood wholly unaffected by it." *Davis* v. *Wallace, supra,* at 484.

The case at bar comes under the rule that would allow us to strike down only the defense provision. In January of 1974, when the new Criminal Code came into effect, it contained both R. C. 2907.32 prohibiting the pandering of obscenity and R. C. 2907.35(C) which protected projectionists from prosecutions under R. C. 2907.32. But the projectionists' defense contained in R. C. 2907.35 (C) did not always exist side by side with the prohibition on pandering obscenity. Under various Ohio Statutes stretching back into the Ohio General Code pandering obscenity has been prohibited. The specific immediate predecessor of the current statute was enacted in 1970. It was not until 1973, however, that the defense for projectionists which eventually became R. C. 2907.35 (C) was enacted into law. For years, the legislature had seen fit to punish panderers of obscenity without affording projectionists any special protection. This brief legislative history leads us to conclude the legislature clearly intended the prohibition against pandering obscenity to stand even if the defense for projectionists was held invalid. Accordingly, we hold that R. C. 2907.35(C) is invalid and must fall, but R. C. 2907.32 is still valid and of full force and effect.

Appellant's final assignment of error is that the movie is not obscene. In judging the obscenity of the movie, the court must apply the three criteria laid down in *Miller* v. *California, supra,* in conjunction with Ohio's statutory definition of obscenity in R. C. 2907.01(F). Upon

Statement of the Case.

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THE STATE OF OHIO, APPELLEE, *v.* BURGUN, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* BAYLESS, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* TUROSO, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* KRUTE, APPELLANT.

[Cite as State v. Burgun (1978), 56 Ohio St. 2d 354.]

Criminal law—Definitions of "obscenity"—Constitutionality—Conviction sustained, when—Indicia of scienter constitutionally adequate, when.

1. R. C. 2907.01(F), which sets forth the definition of "obscenity," is neither unconstitutionally overbroad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in *Miller* v. *California*, 413 U. S. 15.
2. Precise knowledge of the contents of obscene material is not a prerequisite to satisfy the requirement of scienter to sustain an obscenity conviction. Knowledge of the character or nature of obscene material is a constitutionally adequate indicium of scienter to sustain a conviction under R. C. 2907.32(A)(4).

(Nos. 77-1144, 77-1154, 77-1155, 77-1279—Decided December 7, 1978.)

APPEALS from the Court of Appeals for Cuyahoga County.

Counsel for Parties.

The appeals before this court are a consolidation of four cases which originated in Cleveland Municipal Court. The facts surrounding the convictions are similar and can be summarized as follows:

In each case, detectives of the Cleveland Police Department entered adult bookstores during normal business hours where the appellants were employed as cashiers or clerks. The police officers proceeded to the rear of the premises and viewed films in booths with coin-operated projectors of the "peep show" variety.

Having viewed the films and noted their location in the store, affidavits were drawn up describing in detail the sexual activity that took place on the screen. The affidavits were presented to a Municipal Court judge who issued search warrants authorizing the seizure of both the films and the projectors. The items were seized and the appellants arrested and charged with pandering obscenity in violation of R. C. 2907.32(A)(4).

Each appellant received a jury trial in Cleveland Municipal Court. The prosecution in each case consisted primarily of the testimony of the officers who had viewed the films and subsequently completed the affidavits. In addition, each film was admitted in evidence and shown to the jury. Pre-trial motions to suppress and dismiss were overruled as were motions for acquittal filed during the course of the trials.

All four appellants were convicted under the statute for pandering obscenity.

On appeal, the Court of Appeals affirmed the judgment of the trial court in all four cases.

The causes are now before this court pursuant to the allowance of appellants' motions to certify the record.

Ms. Almeta A. Johnson, police prosecutor, *Bertsch, Edelman & Fludine Co., L. P. A.*, and *Mr. Bruce A. Taylor*, for appellee.

Messrs. Berkman, Gordon, Kancelbaum & Levy, Mr. Bernard A. Berkman and *Mr. Joshua J. Kancelbaum*, for appellants.

CELEBREZZE, J.

I.

The appellants have raised seven propositions of law. The first four propositions apply to all four appeals. Propositions No. 5 and 6 apply only to *State* v. *Burgun*, case No. 77-1144, and likewise proposition No. 7 is concerned solely with *State* v. *Krute*, case No. 77-1279.

In their first proposition of law, appellants contend that the definition of obscenity contained in R. C. 2907.01 (F) and incorporated in R. C. 2907.32 (A) (4) is both overbroad and vague and therefore in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. The definition of "obscenity" set forth in R. C. 2907.01 (F) reads as follows:

"When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is 'obscene' if any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual exictement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

"(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such

interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose."

The definition is incorporated into R. C. 2907.32(A)(4) which formed the basis for the prosecution in the present appeals and states, in pertinent part:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

"* * *

"(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged * * *."

The essence of the appellants' criticism is that the definition in R. C. 2907.01 (F) is overbroad "on its face" because an item can be considered "obscene" if *any* of the characteristics outlined in subsections (1) through (5) are present. Since the statute is written in disjunctive rather than conjunctive language, it is alleged that a conviction can be obtained without a finding that the *tripartite* test in *Miller* v. *California* (1973), 413 U. S. 15 has been satisfied.

In that case the United States Supreme Court, at pages 24-25, described the permissible scope of state regulation of obscenity and the three-pronged inquiry to be adopted by the trier of fact as follows:

"* * * As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, *as written or authoritatively construed.* A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a

whole, appeals to the prurient interest * * *; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * * If a state law that regulates obscene material is thus *limited, as written or construed*, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." (Citations omitted; emphasis added.)

In addition to the criticism that subsections (1) through (5) do not facially incorporate the three-part *Miller* test, the appellants have asserted other instances where the statute conflicts with that decision. It is argued that subsection (3) unconstitutionally restricts the depiction of extreme violence when only material depicting or describing sexual conduct may be limited as being obscene. In addition, appellants argue that subsections (1), (2), (3) and (5) are facially overbroad because acts of " ' simple nudity ' " as opposed to hard core pornography can also be considered to be " 'obscene.' " Likewise, what is meant by material whose " 'dominant appeal is to prurient interest' " is cited as a further example of unconstitutional overbreadth. Finally, it is argued that the general lack of specificity found in R. C. 2907.01(F) warrants not only a finding of unconstitutional overbreadth but also a determination that the entire statute is void for vagueness.

In summary, appellants allege in effect that the statute not only has not been "limited, as *written*," in light of the *Miller* guidelines but also is incapable of a "narrowing *construction*" in conformity with that decision. We disagree.

The United States Supreme Court did not intend for every state legislature to rewrite its obscenity statutes as a result of the *Miller* decision. As indicated, an "authoritative construction" of applicable state law limiting the regulation of obscenity by the guidelines in that decision would be constitutionally sufficient.

Following that mandate this court was faced with a construction of the predecessors to the statutes under attack in the present case, R. C. 2905.34 and 2905.35, immediately following the *Miller* decision in *State, ex rel. Sensenbrenner*, v. *Book Store* (1973), 35 Ohio St. 2d 220 and *State, ex rel. Keating*, v. *Vixen* (1973), 35 Ohio St. 2d 215.[1]

In *Vixen* this court held, at page 219, that the statutory definitions "comport with the standards enunciated in *Miller*." Similar language is found in *Sensenbrenner*, at page 221, where this court indicated:

"It is apparent that, if these causes were remanded to the Court of Common Pleas, the trier of the facts, given the standards expressed in *Miller* and the provisions of R. C. 2905.34 as guides for determining the issue of obscenity, could come to no other conclusion than the one reached in the first instance." The application of the *Miller* guidelines to Ohio obscenity law was also noted by this court in *State, ex rel. Ewing*, v. *Without a Stitch* (1974), 37 Ohio St. 2d 95. In that case, the appellants had attacked the definition of nuisance contained in R. C. 3767.01 (C) which, in turn, had incorporated the definition of obscenity upheld in *Vixen, supra*. This court repeated its prior holding and stated once again, at page 101, that "the definition of obscene material contained in R. C. 2905.34 comports with the con-

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[1]R. C. 2905.34(A)(1) through (4) stated, in pertinent part:

"(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, *any of the following apply*:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." (Emphasis added.)

stitutional definition of the word 'obscenity' as enunciated in *Miller* v. *California* * * *." Subsequently, on April 21, 1975, the United States Supreme Court summarily upheld that decision by dismissing an appeal from one of the defendants for "want of a substantial federal question." *Art Theater Guild, Inc.*, v. *Ewing* (1975), 421 U. S. 923.

The essence of these three Ohio decisions was *not* that the wording of R. C. 2905.34 (A) (1) through (4) *visibly, literally*, or *facially* incorporated the tripartite *Miller* test in *each* of those *subsections*. What this court attempted to spell out was that the wording of the *entire* statute, when construed *in pari materia* with the *Miller* decision, adequately protected the First Amendment values applicable to the states through the Fourteenth Amendment. R. C. 2905.34 contained the same *disjunctive* language currently under attack as well as being more general in its terms and definitions than its successor, R. C. 2907.01 (F).

The United States Supreme Court has recently reinforced its policy of upholding facially overbroad state obscenity statutes that have been "narrowed" by an "authoritative construction" in light of the *Miller* guidelines. In *Ward* v. *Illinois* (1977), 431 U. S. 767, the United States Supreme Court was dealing with a state statute that had been patterned after the test for obscenity enunciated in *Roth* v. *United States* (1957), 354 U. S. 476.[*]

As in the cases before this court, the statute was attacked as being unconstitutionally overbroad and vague. Yet, a close reading of that statute reveals a far more generalized description of obscenity than that found in R. C. 2907.01 (F). The statute reads, in pertinent part:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful

[*]The importance of *Roth* v. *United States*, *supra*, was also noted by the General Assembly in the passage of R. C. 2907.01(F) as indicated by the Committee Comment to that statute:

"The definition of obscenity is designed to meet the requirements of *Roth* v. *United States* * * *, and cases following in its wake. It spells out what is 'obscene' in much greater detail than existing case law, in order to increase the utility of the definition for law enforcement purposes."

or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." Illinois Rev. Stat., Chapter 38, Section 11-20-(b) (1975).

The United States Supreme Court pointed out that subsequent to the *Miller* decision, Illinois Supreme Court decisions had proceeded to "construe" Section 11-20 of their Criminal Code to "incorporate" the guidelines in that decision. *Id.*, at pages 774-75. As a result of that state Supreme Court's "response to *Miller*," the court indicated, at page 776, that it would not hold the Illinois statute to be "unconstitutionally overbroad."

This court, as previously noted in *Vixen* and *Sensenbrenner, supra*, has followed a somewhat similar "response to *Miller*" in its construction of R. C. 2905.34. Today, that "response" continues with a further clarification by the interpretation and application of its successor, R. C. 2907.01(F).

We hold that R. C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read *in pari materia* with the *Miller* decision. The *Miller* test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by *Miller*. In addition, a close reading of R. C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited. Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.

In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the Ohio statute and then given a "narrowing" instruction restricting the definition of obscenity to the test laid down in *Miller*. In light of that interpretation and application of R. C. 2907.01(F) this proposition of law

is not well-taken and hereby overruled, except in *State* v. *Burgun*, case No. 77-1144, where the failure to instruct on *Miller* was reversible error.

II.

In their second proposition of law, the appellants argue that a judge must view films such as these prior to the issuance of any search warrant. Furthermore, if viewing the film is not possible the affidavits which form the basis of a subsequent warrant must reflect facts sufficient to satisfy the *Miller* test.

In order to issue a valid warrant the appropriate judicial officer must be able to " 'focus searchingly on the question of obscenity.' " *Roaden* v. *Kentucky* (1973), 413 U. S. 496, 506. In addition, no cases have been cited where it has been specifically held that a judge or magistrate *must* view an alleged obscene film prior to the issuance of a search warrant. To make that procedure a *mandatory* prerequisite to the issuance of a warrant would place an undue burden on an already overladen criminal justice system.

The affidavits in these cases were complete and specific in describing the sexual activity that took place in the films, as well as containing facts relating to the lack of titles, costs of operation, and running time. Taken as a whole, the affidavits contain sufficient facts to authorize a constitutionally sufficient warrant. *Roaden, supra*; *Heller* v. *New York* (1973), 413 U. S. 483. The Municipal Court judge in each instance herein had a full opportunity to make an independent judicial determination of probable cause prior to issuing the warrants and to "focus searchingly on the question of obscenity" in light of the *Miller* test.

This proposition of law is overruled.

III.

In their third proposition of law, appellants argue that knowledge of *both* the content and the character of the films is required to satisfy the *scienter* element for pandering obscenity in R. C. 2907.32. In addition, it is alleged that the circumstantial evidence presented at the trials did not support a finding that the appellants had the requisite *mens rea*.

The requirement of some degree of *scienter* to sustain an obscenity conviction such as those before this court was clearly mandated by *Smith* v. *California* (1959), 361 U. S. 147. However, the United States Supreme Court did not limit the states by spelling out the particular type of *mens rea* that would be constitutionally sufficient.

The predecessor to the current statute on pandering obscenity was R. C. 2905.35, which was specifically worded so as to require "knowledge of the content and character" of obscene material as a prerequisite to prosecution.* The necessity of finding knowledge of the "content" of the material was further reinforced by this court's decision in *State, ex rel. Ewing, supra*. However, by requiring that knowledge of the "content" of obscene material is necessary, this court did not imply that there be either knowledge of the *actual* content or the fact that it was *legally* obscene. See *Rosen* v. *United States* (1896), 161 U. S. 29.

The current statute under which these appellants were convicted, R. C. 2907.32(A), describes the requisite element of *scienter* as follows: "No person, with *knowledge of the character of the material or performance involved,* shall do any of the following * * *." (Emphasis added.) Furthermore, R. C. 2907.35(A)(2) describes a situation when a rebuttable presumption of that "knowledge" will arise:

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*R. C. 2905.35 stated, in pertinent part:

"No person, with *knowledge of the content and character of the obscene material or performance involved,* shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

"Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both." (Emphasis added.)

"(A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling materials or exhibiting performances who, in the course of business:

"• • •

"(2) Does any of the acts prohibited by section 2907.31 or *2907.32* of the Revised Code, is presumed to have *knowledge of the character of the material or performance* involved, if he has *actual notice* of the *nature of such material* or performance, *whether or not he has precise knowledge of its contents.*" (Emphasis added.)

As indicated by the statutory language, "precise knowledge" of *"contents"* is unnecessary and instead the emphasis is on "notice" of the *"nature"* of the material.

Knowledge of the "character" or "nature" of obscene material has been held to be a constitutionally adequate indicium of *scienter* to uphold an obscenity conviction. *Mishkin* v. *New York* (1966), 383 U. S. 502, *rehearing denied* 384 U. S. 934; *United States* v. *Hill* (C. A. 5, 1974), 500 F. 2d 733, *certiorari denied* 420 U. S. 952; *United States* v. *Groner* (C. A. 5, 1974), 494 F. 2d 499, *certiorari denied* 419 U. S. 1010; *United States* v. *Thevis* (C. A. 5, 1973), 484 F. 2d 1149, *certiorari denied* 418 U. S. 932, *rehearing denied* 419 U. S. 886. In light of the foregoing we conclude that "knowledge of the character of the material" is sufficient to sustain a conviction under R. C. 2907.32(A)(4).

In proving a defendant had knowledge of the character of obscene material the state may rely solely on circumstantial evidence. *Smith* v. *California, supra* at page 154; *State* v. *American Theatre Corp.* (1975), 193 Neb. 289, 227 N. W. 2d 390. A survey of the records in these four appeals reveals that the appellants were all involved in the operation of the bookstores as cashiers or clerks. Their position placed them in the front of the premises where they were in full view of sexually oriented magazines, books, artificial sexual aides and related sexual paraphernalia located in display cases. The movies were shown in the rear of the premises in booths with coin-operated projectors.

As employees responsible for selling these materials and dispensing change to customers, the evidence presented

is sufficient so that a jury could have inferred beyond a reasonable doubt that the appellants had knowledge of the character of the films being shown. Appellants' third proposition of law is overruled.

IV.

In the appellants' fourth proposition of law, claim is made that R. C. 2907.35(C), providing a qualified exemption for projectionists who have neither a financial interest in their place of employment nor any managerial responsibilities over its operation, violates the Equal Protection Clause of the Fourteenth Amendment.

Before an individual can challenge state legislation as violative of the federal constitution he must bring himself within the class affected by the unconstitutional feature. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.* (1919), 249 U. S. 134, 149. In other words, a person who is seeking to raise the issue of the validity of a discriminatory enactment has no standing for that purpose unless he belongs to the class which is prejudiced by the statute. *Witham* v. *South Side Bldg. & L. Assoc.* (1938), 133 Ohio St. 560; *Anderson* v. *Brown* (1968), 13 Ohio St. 2d 53.

It is uncontroverted that none of the appellants offered proof at the trial court level to show that they were in a position similar to that of the projectionists. There is insufficient probative evidence in the record to establish that a proper person has brought himself within the class of persons standing in the same position as the statutorily exempted projectionists.

Appellants' fourth proposition of law is overruled.

V.

Proposition of law No. 5 relates solely to *State* v. *Burgun*, Case No. 77-1144. Appellant Burgun alleges that in a prosecution under R. C. 2907.32 it is error for a trial court to fail to instruct the jury on the definition of obscenity established in *Miller* v. *California, supra.* The trial judge instructed the jury solely under the statute. Pursuant to the discussion in Part I of this opinion the failure to give a narrowing instruction was reversible error.

VI.

In proposition of law No. 6, appellant Burgun alleges

that it was error for the trial court both to fail to dismiss a complaint under R. C. 2907.32(A)(4) which lacks an allegation that the accused had knowledge of the "content" of the allegedly obscene material and to fail to instruct the jury on the necessity of such knowledge. In light of the discussion of the degree of *scienter* required for a prosecution under this statute in Part III of this opinion knowledge of the "character" of the material is all that is necessary. Appellant Burgun's proposition of law is overruled.

VII.

The seventh proposition of law relates solely to *State* v. *Krute*, case No. 77-1279. Appellant Krute argues that certain remarks made by the prosecutor in his closing argument were so prejudicial they deprived him of his right to a fair and impartial trial. The appellant claims the prosecutor urged the jury to convict him to help stamp out obscenity, injected his own personal views, and argued points unsupported by the evidence.

Upon a careful review of the record it is evident, as the Court of Appeals noted, that some of the remarks made by the prosecution were improper. However, there is no evidence in the record that indicates that they were so prejudicial or inflammatory as to deprive this appellant of his constitutional right to a fair trial. This proposition of law is overruled.

The propositions of law that relate to *State* v. *Bayless*, case No. 77-1154; *State* v. *Turoso*, case No. 77-1155; and *State* v. *Krute*, case No. 77-1279 are not well-taken and those judgments are affirmed. Proposition of law No. 5 relating to *State* v. *Burgun*, case No. 77-1144, is well-taken. The judgment of the Court of Appeals in case No. 77-1144 is reversed and that cause is remanded for a new trial in accordance with the foregoing opinion.

Judgment accordingly.

Leach, C. J., Herbert, P. Brown, Sweeney and Locher, JJ., concur

W. Brown, J., concurs in case No. 77-1144, but dissents in cases Nos. 77-1154, 77-1155 and 77-1279.

The following states have statutes which give motion picture operators either an exemption or an affirmative defense to the criminal charge of pandering obscenity:

California	Cal. Pen. Code 311.2
Idaho	Idaho Code 18-4102
Kansas	Kan. Stat. 21-4213
Louisiana	La. Rev. Stat. 14:106
Massachusetts	Mass. Gen. L.c. 272, 32
Maryland	Art. 66A, Sec. 19
Minnesota	Minn. Stat. 617.295
Nebraska	Neb. R.S. 28-926.19(3)
Nevada	Nev. R.S. 201-254
New Hampshire	N.H.R.S. C.650, Sec. 3
New Jersey	N.J.R.S. 2A:115-6
New York	N.Y. Pen. L. 235.15
Oklahoma	Okl. Stat. 1040.53
Oregon	Ore. R.S. 167.075
Rhode Island	R.I. Gen. L. 11-31-75
Utah	Ut. Code 76-10-1208
Virginia	Va. Code 18.2-375
Washington	RCWA 9.68.010
West Virginia	W.Va. Code 61-8A-3